No. 14824

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SEABOARD LEMON ASSOCIATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

SEABOARD LEMON ASSOCIATION,

Respondent.

Petition for Review and Petition for Enforcement of Order of National Labor Relations Board.

Brief of Petitioner Seaboard Lemon Association.

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Preliminary Statement.

A. Jurisdiction.

The matter to which review is sought consists of a Decision and Order dated April 13, 1955 [Tr. 65-68],[1] made

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[1]Transcript of Record.

by the National Labor Relations Board (hereinafter called the "Board") in a proceeding entitled Seaboard Lemon Association (hereinafter called "Petitioner"), and United Fresh Fruit & Vegetable Workers, LIU No. 78, CIO (hereinafter called "Fruit & Vegetable Union") case number 21-CA-1948, holding that Petitioner had committed unfair labor practices and had refused to bargain with the said Union.

The Petition praying that the Order of the Board be set aside was filed under the provisions of Section 101.14 of the Rules and Regulations of the Board, and under the provisions of Section 10(f) of the Labor Management Relations Act, 1947, and in compliance with Rule 34 of the Rules of the United States Court of Appeals for the Ninth Circuit, as amended effective January 1, 1949.

The above Act of Congress, approved June 23, 1947, known and designated as the "Labor Management Relations Act, 1947" (29 U. S. C. A., Sec. 141), provides as follows as to review of this Order:

> "Sec. 10(f). Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside." (29 U. S. C. A., Sec. 160(f).)

B. Statement of the Case.

Petitioner is a California cooperative non-profit association with its principal place of business in Oxnard, California, where it is engaged in processing and packing citrus fruits [Tr. 11, 15].

On November 4, 1953, Petitioner's employees elected said Fruit & Vegetable Union as their bargaining representative [Tr. 6]. On November 13, 1953, the Board certified said Fruit & Vegetable Union as the employees' exclusive bargaining representative [Tr. 8-9].

Bargaining meetings were held between Petitioner and said Fruit & Vegetable Union on January 4, 29, February 5, 18, 25 and March 17, 25, 1954 [Tr. 44]. On March 25, 1954, a petition signed by more than a majority of the employees and repudiating said Union was served on Petitioner [Tr. 46, 104, 24]. Charges were filed by said Fruit & Vegetable Union against Petitioner on March 29, 1954, alleging refusal to bargain with said Union [Tr. 9-10]. Complaint was issued by the Board on or about May 28, 1954 [Tr. 11-14], and hearing was had before Trial Examiner Herman Marx, in Oxnard, California, on October 4 and 5, 1954 [Tr. 36, 39].

Petitioner filed written Exceptions to the Trial Examiner's Findings that it committed unfair labor practices: (1) by refusal to bargain with said Fruit & Vegetable Union; (2) by granting a unilateral wage increase, and (3) to his Recommendation that Petitioner bargain with the United Packinghouse Workers of America, Local

78, CIO (hereinafter referred to as the "Meatpackers Local") [Tr. 63-64].

The Board affirmed the Rulings and Recommendations of the Trial Examiner and ordered Petitioner to bargain with the said Meatpackers Local [Tr. 65].

Petitioner thereafter filed its Petition for Review with the above entitled court [Tr. 73].

C. Specifications of Error.

The Board erred in affirming the Findings, Conclusions and Recommendations of the Trial Examiner as follows: (1) that the said Meatpackers Local is the exclusive bargaining representative of Petitioner's employees; (2) that Petitioner committed unfair labor practices by refusal to bargain with the said Meatpackqers Local; (3) in recommending that in the future Petitioner bargain with the said Meatpackers Local; (4) that Petitioner committed unfair labor practices by making a unilateral wage increase; (5) that Petitioner engaged in unfair labor practices within the meaning of 8(a) (1) and (5) of the Labor Management Relations Act [Tr. 76-77].

ARGUMENT.

I.

The Union Is Not the One Elected by the Employees and Is Not Bargaining Representative of the Employees' "Own Choosing."

Employees have the statutory right "to bargain collectively through representatives of their own choosing." (Sec. 7, Labor Management Relations Act, 1947, 29 U. S. C. A., Sec. 157.)

The instant point is presented in support of Petitioner's Exceptions to the Board's Findings and Conclusions that Petitioner committed unfair labor practices by refusal to bargain with said Meatpackers Local, and to the Board's Order that Petitioner:

> "Upon request, bargain collectively with United Packinghouse Workers of America, Local 78, CIO, as the exclusive representative of the employees in the appropriate unit described above, and if an understanding is reached embody such understanding in a signed agreement." [Tr. 67.]

The Unions involved herein, namely, the said Fruit & Vegetable Union, the said Meatpackers Local and the United Packinghouse Workers of America, CIO, an international union (hereinafter called the "Meatpackers International"), are the same unions that are referred to in the related case of Santa Clara Lemon Association, No. 14840.

The facts in this case are substantially the same on the above issue as the facts in the *Santa Clara* case. In the

instant case the Board approved the substitution of the Meatpackers Local "For the reasons set forth in Santa Clara Lemon Association," etc. [Tr. 66, footnote 1].

Therefore, we incorporate herein by reference and make a part hereof as though set forth herein in full the argument appearing on pages 5 through 24 of the Brief of Petitioner, Santa Clara Lemon Association, filed with the above entitled court on or about December 31, 1955 in Case No. 14840.

For the reasons heretofore stated the Board's Order that Petitioner bargain collectively with the said Meatpackers Local is contrary to law and in violation of the rights of the employees in the bargaining unit, and the Board's finding that Petitioner failed and refused, contrary to the Act, to bargain with the Meatpackers Local should be reversed.

II.

Granting the Unilateral, General Wage Increase Did Not Constitute an Unfair Labor Practice.

It was stipulated that a general wage increase was granted on April 2, 1954 [Tr. 94]. Petitioner admits that it did not consult any Union about the wage increases [Tr. 110].

The reasons for the wage increases and the circumstances surrounding them were explained by Petitioner's Manager, Clarence Sewell [Tr. 105-110]. Petitioner made the wage increases because of a change in operations necessitating an hourly rate of pay instead of the former

piece rate [Tr. 106], and to meet the competitive wage increases [Tr. 105].

The Trial Examiner considers that the purpose is immaterial even though the wage increase was made solely because of business necessity [Tr. 55, footnote 12]. The Board has not been so arbitrary. It has held that unilateral wage increases may be made when bargaining negotiations were in suspension. In regard to the effect of a "suspension" of negotiations, the Board declared:

> "In these circumstances the respondent was under no duty to withhold normal action respecting wages pending consultation with the Union." (*Montgomery Ward & Co.*, 39 N. L. R. B. 229; *Westchester Newspapers, Inc.*, 26 N. L. R. B. 630.)

In the instant case we have negotiations suspended as a result of the conflicting demands of the Fruit & Vegetable Union on one side and of a majority of the employees and unusual circumstances on the other [Tr. 24-26]. How soon the difficulty would be resolved by the Board, or by a Court, or both, could not be foreseen. It might take a month, a year, or even two or three years. In the meantime, the employees would be deprived of a wage adjustment to which they were admittedly entitled because of the July, 1953, major change in operations—this matter had been under study since the Spring of 1953 [Tr. 106]. Petitioner's labor supply would be jeopardized by its inability to meet competitive wage rates. Should both Petitioner and the employee be penalized by a frozen wage scale throughout the period necessary to resolve the legal conflict?

Petitioner did the only thing that it could reasonably do under the circumstances. It made unilateral wage increases.

For each of the above reasons, the Board's finding that Petitioner committed an unfair labor practice by granting a unilateral, general wage increase should be reversed.

Respectfully submitted,

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